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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

DEC 01 2010

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a computer hardware reseller. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is January 6, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's April 10, 2008 denial, the primary issue in this case is whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

In order for the petition to be approved, the petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). The regulation 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

² The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the January 6, 2005 priority date.

The proffered wage stated on the labor certification is \$85,759.00 per year. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$23 million, and to employ 14 workers. According to the tax returns in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary claimed to have worked for the petitioner since August 2003. The record contains the beneficiary's Forms W-2, Wage and Tax Statement, for 2005, 2006 and 2007. The record also contains a 2007 Form 1099-MISC issued by the petitioner to the beneficiary. These documents state the wages paid to the beneficiary by the petitioner, as shown in the table below.

Year	Wages Paid (\$)	Shortfall (\$)
2005	25,615.34	60,143.66
2006	57,000.08	28,758.92
2007	69,500.08 ³	16,258.92

Therefore, for the years 2005, 2006 and 2007, the petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage. The petitioner must establish that it can pay the difference between wages paid to the beneficiary and the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required period, USCIS will next examine the net income

³ The 2007 Form W-2 states a wage of \$65,500.08, and the 2007 Form 1099-MISC states compensation of \$4,000.00.

figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). The petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner's total payroll exceeded the proffered wage is insufficient.

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at

537 (emphasis added).

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.⁴

Year	Net Income (\$)
2005	-2,167.00
2006	-1,240.00
2007	-105,684.00

Therefore, for 2005, 2006 and 2007, the petitioner did not have sufficient net income to pay the difference between the wage paid and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its net current assets for the required period, as shown in the table below.⁶

⁴ The petitioner filed its tax returns using Form 1120S, U.S. Income Tax Return for an S Corporation. For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 18 (2006 to present) or Line 17e (2004 and 2005). When the two numbers differ, the number reported on Schedule K is used for net income.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ On Form 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L,

Year	Net Current Assets (\$)
2005	-579,918.00
2006	-621,025.00
2007	-746,445.00

For the years 2005, 2006 and 2007, the petitioner did not have sufficient net current assets to pay the difference between the wage paid and the proffered wage.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The record contains copies of the petitioner's bank statements. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income or the cash specified on the petitioner's tax returns used in determining the petitioner's net current assets. Fourth, bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

Further, it is noted that the petitioner has filed petitions on behalf of the following additional beneficiaries:

Last Name	Receipt Number	Priority Date	Proffered Wage (\$)
		March 25, 2005	60,000.00
		May 28, 2003	78,890.00
		May 10, 2006	23,000.00

Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date of each petition and continuing until each beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. at 144.

and current liabilities to be the sum of Lines 16 through 18.

The record contains copies of Forms W-2 stating the wages paid to the beneficiaries by the petitioner, as shown in the tables below:

Year	Wages Paid (\$)	Shortfall (\$)
2005	78,000.00	0.00
2006	97,500.00	0.00
2007	105,000.00	0.00

Year	Wages Paid (\$)	Shortfall (\$)
2005	141,000.00	0.00
2006	97,500.00	0.00
2007	175,500.00	0.00

Year	Wages Paid (\$)	Shortfall (\$)
2006	0.00 ⁷	23,000.00
2007	2,710.68	20,289.32

Thus, the petitioner has not established its ability to pay the proffered wage for the beneficiary or the proffered wage to another beneficiary of a petition during the applicable period.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business

⁷ The record contains a letter from the petitioner stating that this beneficiary initiated employment with the company on November 11, 2007.

reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 2000 and to employ 14 workers. The petitioner's tax returns show gross sales of \$19,016,921.00 in 2005, \$21,801,575.00 in 2006 and \$19,387,797.00 in 2007. Although USCIS does not consider a company's income without also considering its expenses, it is noted that the petitioner has substantial and consistent annual sales. The petitioner's tax returns show salaries and wages paid of \$666,902.00 in 2005, \$780,514.00 in 2006 and \$751,163.00 in 2007. The record includes the petitioner's internal quarterly payroll statements for 2005 and 2006, which corroborate the petitioner's claimed number of employees. However, this, by itself, is not sufficient to establish the petitioner's ability to pay the proffered wage. In addition, the petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service.

The petitioner's tax returns also show officer compensation of \$70,000.00 in 2005, \$180,000.00 in 2006 and \$157,500.00 in 2007. On appeal, counsel claims the profits of the business were issued to [REDACTED] the owner of the petitioner, as officer compensation. Counsel submits a letter from [REDACTED] dated February 20, 2008, stating that "the petitioner has a policy of running its annual profits through [the sole shareholder's] Form W-2" and that the company's profits are therefore reflected in the petitioner's owner's Forms W-2. The record also contains the petitioner's owner's Forms W-2 for 2005, 2006 and 2007. These documents confirm that the petitioner paid the owner a salary of \$70,000.00 in 2005, \$180,000.00 in 2006 and \$157,500.00 in 2007. The different amounts issued each year by the petitioner as officer compensation support counsel's claim that the petitioner's profits were issued to the petitioner's owner each year.

Counsel also claims that the owner of the petitioner owns 12 businesses from which he also receives income. The record contains a second letter from [REDACTED] dated May 2, 2008, listing the names of the 12 businesses that [REDACTED] purportedly "owns and/or operates." Attached to the letter are 2007 Forms W-2 issued to the petitioner's owner by [REDACTED] in the amount of \$211,000.00, by [REDACTED] in the amount of \$1,750.00, and by [REDACTED] in the amount of \$2,000.00. Also attached are Articles of Incorporation and Share Certificates for [REDACTED] showing [REDACTED] as the owner of the companies. This evidence is submitted in order to establish that [REDACTED] did not exclusively rely on his compensation from the petitioner for his livelihood, and that he could forego a portion of

his officer compensation to pay the beneficiary's proffered wage.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. The documentation presented here indicates that the petitioner's owner holds 100% percent of the company's stock. As is noted above, the compensation received by the company's owner during these years was not a fixed salary.

USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In the present case, however, counsel is not suggesting that USCIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that employee-owners have in setting their salaries based on the profitability of their corporation.

However, counsel only provides information about the additional income [REDACTED] receives from three other companies for 2007. In addition, the record does not contain any information about the officer compensation that he may have received from any of the other companies in 2005 and 2006. The evidence in the record establishing the amount of officer compensation received by [REDACTED] when compared to the annual shortfall in paying the proffered wage to the beneficiary (as well as the shortfall in the proffered wage in 2006 and 2007 for the beneficiary [REDACTED]), it cannot be concluded based on the evidence in the record that [REDACTED] could have foregone the officer compensation to meet the shortfall between the actual wages paid and the proffered wages.⁸

Therefore, after considering the totality of the circumstances, including the length of time the petitioner has been in business, its number of employees and annual payroll, the magnitude of the petitioner's annual sales, and the compensation paid to the petitioner's owner, it is concluded that the petitioner has failed to establish its continuous ability to pay the proffered wage from the January 5, 2005 priority date. Significantly, the petitioner could not establish ability to pay using its tax returns for any of the years in question, it has substantial negative net current assets, it has been in business

⁸ In 2005, the difference between the wage paid and the proffered wage for the beneficiary was \$60,143.66, and the officer compensation on the tax return was \$70,000.00. In 2006, the difference between the wage paid and the proffered wage for the two beneficiaries was \$51,758.92, while the officer compensation on the tax return was \$180,000.00.

a relatively short period of time and has a modest number of employees, and the annual shortfall required to be for paying the proffered wage to the beneficiaries is substantial when compared to the amount of officer compensation, particularly when factoring in the additional amount required to pay the other beneficiary.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.